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September 24, 1999

Magalie Roman Salas, Secretary  
Federal Communications Commission  
TW B204  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: MindSpring Enterprises, Inc. comments *In*  
*Connection with the Court Remand of the*  
*August 1998 Advanced Services Order (CC*  
*Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-91,*  
*98-147)*

Dear Ms. Salas:

Enclosed please find the original and two (2) copies of the Comments of MindSpring Enterprises, Inc. for filing in the above-captioned matter.

Pursuant to the Commission's Notice dated September 9, 1999, we are also filing copies of this filing with Janice Myles of the Common Carrier Bureau and the International Transcript Service. Also, as indicated on the attached Certificate of Service, we have provided one copy of these comments to counsel for U.S. West.

Also enclosed is an extra copy marked "stamp and return." Please stamp this copy acknowledging receipt and return it to our messenger.

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Magalie Roman Salas  
September 24, 1999  
Page Two

If you have questions regarding this filing, please contact the undersigned.

Sincerely,

A handwritten signature in dark ink, appearing to read 'E. Comstock', with a long horizontal flourish extending to the right.

Earl W. Comstock  
John W. Butler  
Counsel for MindSpring Enterprises, Inc.

cc: Janice Myles, Common Carrier Bureau  
International Transcript Service

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

*Comments Requested* )  
*In Connection with Remand* )  
*of August 1998* )  
*Advanced Services Order* )  
)  
)

CC Docket Numbers: 98-11  
98-26  
98-32  
98-78  
98-91  
98-147

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FEDERAL COMMUNICATIONS COMMISSION  
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**COMMENTS OF MINDSPRING ENTERPRISES, INC.**

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September 24, 1999

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## COMMENTS OF MINDSPRING ENTERPRISES, INC.

MindSpring Enterprises, Inc. (MindSpring), by its attorneys, hereby submits its comments *In Connection with the Court Remand of the August 1998 Advanced Services Order* (CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-91, 98-147) DA 99-1853 (released September 9, 1999). MindSpring supports the Commission's determination in the *Advanced Services Order*<sup>1</sup> that xDSL services are "telephone exchange services" under the amended definition of that term that was added by Congress in 1996. The Commission's decision meets the statutory definition because xDSL services provide a telecommunications service that is "comparable" at the beginning of the 21<sup>st</sup> century to the local access connection that traditional "telephone" services have provided for much of the 20<sup>th</sup> century.

## INTRODUCTION

MindSpring is one of the nation's leading Internet service providers (ISPs), with a particular focus on residential and small business customers. The company started as a local ISP in Atlanta in 1994, and has grown to become regional and now national in scope. MindSpring currently serves approximately 1.3 million customers nationwide, and our pending merger with EarthLink will more than double this figure. MindSpring has consistently earned top marks for quality of service and customer satisfaction.

MindSpring and other ISPs are proud to play a major role in the information revolution, encouraging widespread usage of the Internet by making it widely and easily accessible to consumers. As the world of communications evolves to a packet-switched, "always on"

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<sup>1</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 et al., Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC 98-188 (released August 7, 1998) (hereinafter "*Advanced Services Order*").

environment for broadband services, ISPs will address consumers' need for advanced information capabilities. They will help consumers connect to and take maximum advantage of high speed, "always on," two-way packet networks so that the full promise of the Internet can be achieved. However, MindSpring and other ISPs will be hindered in their ability to bring cost-effective choices to consumers, or in some cases offer broadband Internet access at all, if competitive local exchange carriers (CLECs) are not able to use the pro-competitive provisions Congress provided in the Telecommunications Act of 1996 (hereinafter the "1996 Act") to offer digital subscriber line (xDSL) services that provide a broadband local access link between residential and business consumers and the ISP of their choice.

## **ARGUMENT**

The Commission has asked in this proceeding for comment on four specific questions<sup>2</sup> raised by the U.S. West brief.<sup>3</sup> Each of the questions is inter-related with the next, and MindSpring believes that the answer to all of them flows from the answer to question 2 – "what is the legal significance of the 1996 Act's addition to the definition of 'telephone exchange service.'"<sup>4</sup> The answer is that it is very significant. That amendment is the key to achieving one of the primary goals of the Telecommunications Act of 1996 (hereinafter the "1996 Act"), namely the opening of the monopoly local exchange market to competition. The amendments to the Communications Act of 1934 (hereinafter the "Act") made by the 1996 Act give competing

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<sup>2</sup> See Public Notice of the Federal Communications Commission, DA 99-1853, p.2 (released September 9, 1999).

<sup>3</sup> Brief of U.S. West Communications, Inc. in *U.S. West Communications, Inc. v. Federal Communications Commission and United States of America*, United States Court of Appeals for the District of Columbia Circuit, No. 98-1410, filed May 17, 1999 (hereinafter *U.S. West Brief*).

<sup>4</sup> See note 2, *supra*.

telecommunications carriers the right to obtain interconnection to the facilities of an incumbent local exchange carrier (ILEC) only for the “transmission and routing of a telephone exchange service and exchange access.” 47 U.S.C. 251(c)(2)(A). As a result, if U.S. West’s interpretation of the statute were correct, no telecommunications carrier that seeks to provide competitive local exchange service could obtain interconnection to the ILEC network under section 251 of the Act for the purpose of providing xDSL services, or for that matter to provide any service that provides dedicated access (whether private line or special access<sup>5</sup>) between an end user and an interexchange carrier or an ISP. Instead, the interconnection right that Congress viewed as a linchpin to local competition would be limited to services that are the narrowly defined “functional equivalent” or a “substitute” for “local, two-way switched voice services.” *U.S. West Brief* at 33-34. Such a result is contrary to the plain language of the statute and the clear intent of Congress, and would deny consumers competitive alternatives for obtaining a local transmission link to the ISP of their choice.

**A. THE PLAIN LANGUAGE OF THE STATUTE DEMONSTRATES THAT THE AMENDED DEFINITION ADDED BY CONGRESS IN 1996 IS MUCH BROADER THAN THE EARLIER DEFINITION, AND CAN NOT BE VIEWED AS DESCRIBING ONLY THOSE SERVICES THAT ARE A “SUBSTITUTE” FOR “TRADITIONAL VOICE TELEPHONE SERVICE.”**

Section 3(47) of the Act defines “telephone exchange service” to mean—

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or

(B) comparable service provided by a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber may originate and terminate a telecommunications service. 47 U.S.C. 153(47).

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<sup>5</sup> See *In the Matter of GTE Telephone Operating Cos. GTOC Tariff No. 1*, FCC 98-292 (released October 30, 1998), n. 87 (definition of private line) and ¶ 24-25 (describing special access).

Subparagraph (A) of the definition was originally included by Congress when the Act was enacted in 1934. Subparagraph (B) was added by Congress in the 1996 Act. While MindSpring does not agree with U.S. West's narrow interpretation of subparagraph (A),<sup>6</sup> the plain language of subparagraph (B) makes an extensive rebuttal of U.S. West's interpretation unnecessary.<sup>7</sup>

U.S. West advocates a very narrow reading of subparagraph (B) by applying the term "comparable" in a manner that would rob subparagraph (B) of any real meaning. If U.S. West's view is correct, it would have been unnecessary for Congress to amend the definition at all. Under that view the term "comparable" subjugates all other terms used by Congress in subparagraph (B), such that taken together subparagraph (B)'s terms are limited to services that are equivalent to, or exact marketplace substitutes for, the services described in subparagraph (A). The very terms chosen by Congress make such an interpretation impossible.

A "service provided by a system of switches, transmission equipment, or other facilities" is clearly not the same as, or in any way limited to, "service within a telephone exchange" or a "connected system... acting as a single exchange." In the same manner, the phrase "by which a subscriber can originate or terminate a telecommunications service" is both broader and more

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<sup>6</sup> For example, U.S. West's argument (*U.S. West Brief at 30*) that its xDSL service is not included in the price of basic local telephone service and is therefore excluded under subparagraph (A) ignores the court's ruling in *Southwestern Bell Telephone Co. v. United States*, 45 F. Supp. 403 (W.D. Mo. 1942), which held that the phrase "covered by the exchange service charge" in the definition should be read in light of the context in which the term "telephone exchange service" is used in other parts of the statute, and could be read to include all "charges, practices, classifications, services, and facilities, or regulations of the exchange." 45 F. Supp. at 406. Under this interpretation the additional charge for xDSL service would be no different than the additional "zone" charge at issue in *Southwestern Bell Telephone Co.*

<sup>7</sup> It should be noted that adoption of U.S. West's narrow view of subparagraph (A) will raise the bar for approval of an RBOC application to provide in-region interLATA services under section 271 of the Act. Section 271(c)(1)(A) explicitly limits the inquiry regarding the provision of competing service to residential and business subscribers to "telephone exchange service" as defined in subparagraph (A). 47 U.S.C. 271(c)(1)(A). Under U.S. West's view, dedicated access services provided to business customers by competitors would appear not to qualify for purposes of the section 271 analysis.



specific than the earlier phrase “intercommunicating service of the character ordinarily furnished by a single exchange.” “Originate and terminate” are simply not the same as “intercommunicating.”<sup>8</sup> Nor is “telecommunications service” the same as, or as limited as, “telephone” service.<sup>9</sup> Finally, there is no requirement in subparagraph (B) that the service be “covered by the exchange service charge.” In fact, such a requirement was explicitly deleted from subparagraph (B) when Congress adopted the final text of the 1996 Act.<sup>10</sup>

**B. SUBPARAGRAPH (B) “TELEPHONE EXCHANGE SERVICE” MUST BE “COMPARABLE” ONLY IN THE SENSE THAT IT PROVIDES A “LOCAL” ACCESS LINK BETWEEN THE SUBSCRIBER AND COMMUNICATIONS NETWORKS THAT ALLOW THAT SUBSCRIBER TO REACH OTHER SUBSCRIBERS AND PROVIDERS OF TELECOMMUNICATIONS AND INFORMATION SERVICES.**

Given the fact that the two subparagraphs use very different terms to define what is a “telephone exchange service,” it is clear that subparagraph (B) is intended to include a broader range of services than subparagraph (A). As a result, the term “comparable” must be given meaning in its broadest sense. That meaning can best be determined by looking at how the term “comparable” interacts with the rest of subparagraph (B). Without the term “comparable,” subparagraph (B) would be almost boundless. Any service that allows a subscriber to originate or terminate a telecommunications service could be considered a “telephone exchange service”

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<sup>8</sup> “Intercommunicate” is defined as “to exchange communication with one another.” *Webster’s Ninth New Collegiate Dictionary* (1986), p. 630. “Originate” is defined as “to initiate.” *Id.*, p. 832. “Terminate” is defined as “coming to an end.” *Id.*, p. 1217.

<sup>9</sup> “Telecommunications service” is defined in section 3(46) of the Act. 47 U.S.C. 153(46). “Telephone” is not defined under the Act. The Commission found in the *Universal Service Order* that “telecommunications services” include special access and private line services that U.S. West argues (*U.S. West Brief at 34*) are excluded from the definition of telephone exchange service under subparagraph (A). See Report and Order, *Federal-State Joint Board on Universal Service*, FCC 97-157 (released May 8, 1997) ¶ 780.

<sup>10</sup> Compare section 501(a)(1)(B) of H.R. 1555 as enacted by the House of Representatives (October 12, 1995) with 47 U.S.C. 153(47)(B).

regardless of the combination of facilities used. A “telephone exchange service” could include voice or data services from coast to coast, since there is no functional or geographic boundary defined by the description of the system used or telecommunications service offered in subparagraph (B). However, by adding the term “comparable” Congress rectified that problem, by establishing a comparison with the basic function provided to consumers by the “telephone exchange” described in subparagraph (A).

The definition in subparagraph (A), which Congress did not modify, has been in use for over 60 years. During that time the Commission has found that “telephone exchange service,” as defined in subparagraph (A), may

be generally characterized as the provision of two way voice communications between individuals by means of a central switching complex which interconnects all subscribers in a geographic area.<sup>11</sup>

This general characterization has come about in specific circumstances where the Commission or the courts have been called upon to decide upon whether or not a specific service qualifies under the old definition. During those same sixty years, ILECs have been providing numerous telecommunications services that may or may not meet that general characterization, but are certainly services that one could traditionally obtain only from the ILEC. These telecommunications services were generally classified as residential or business, and included both switched and dedicated access services. *See 47 CFR, Part 36*. Whether a local or interstate service for purposes of Federal or State tariffs, what all of the services generally provided by the ILEC shared, and now share in common with CLECs, is that these services provide the local link between the customer premises (or person) and the facility of a provider (be it the LEC, an

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<sup>11</sup> *Amendment of Parts 21 and 43 of the Commission’s Rules and Regulations Relative to Various Procedural Requirements for the Domestic Public Radio Service*, 76 FCC 2d 273 at 281 (1980). *See also U.S. West Brief at 22* (citing the same quote, but without noting the context used by the Commission, i.e., “generally characterized as”).

interexchange carrier, or an information service provider) by which their telecommunication can reach other subscribers and service providers who are connected, directly or indirectly, to the network of the LEC.

It is in this context – the context of a local connection between a customer’s premises and both the intraexchange and interexchange telecommunications networks – that the term “comparable” must be viewed. Neither the courts nor the Commission has provided any deliberative evaluation of the new subparagraph added by Congress in the 1996 Act.<sup>12</sup> “Telecommunications service” is a defined term under the amendments made by the 1996 Act. 47 U.S.C. 153(46). As used throughout the amendments made by the 1996 Act, and in the 1996 Act itself, it is clear that Congress intended the term to evolve over time and to be the basic building block by which consumers would gain access to information services offered over the Nation’s communications networks.<sup>13</sup>

The fact that U.S. West’s xDSL service is provided using a “dedicated,” “always-on” permanent virtual circuit that connects the subscriber with only one ISP<sup>14</sup> is irrelevant under the

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<sup>12</sup> MindSpring agrees with U.S. West that the Commission has not yet articulated a definition of the term “comparable” as used in subparagraph (B), or for that matter of subparagraph (B) as a whole. *U.S. West Brief at 31-32*. Ironically, U.S. West appears to overlook that fact when it references the Commission’s statement that “private line [and] special access... services do not fall within the statutory definition of ‘telephone exchange service.’” *U.S. West Brief at 34*, citing to *Applications for Consent to the Transfer of Control of Licenses from Tele-Communications Inc. to AT&T Corp.*, FCC 99-24, ¶ 135. Unfortunately for U.S. West, that opinion by the Commission only applied subparagraph (A) of the definition of “telephone exchange service” and provided no analysis whatsoever of the potential application of subparagraph (B) of that definition. The Commission should reconsider its statement in light of that new subparagraph.

<sup>13</sup> See 47 U.S.C. 254 (universal service is an evolving level of telecommunications service that should provide access to advanced telecommunications and information services), 47 U.S.C. 153(20) (information services are provided “via telecommunications”), and 47 U.S.C. 157nt (Section 706 of the 1996 Act instructing Federal and State agencies with “jurisdiction over telecommunications services” to promote “advanced telecommunications capability”).

<sup>14</sup> *U.S. West Brief at 13*. It should be noted that not all U.S. West xDSL offerings provide an “always on” connection. U.S. West’s Megabit 256 Select service requires subscribers to initiate a modem call each time they wish to use the service. Depending on the availability of ports at (continued)

clear terms used by Congress in subparagraph (B). Under the definition, it does not matter that the ISP may in fact route the call to its ultimate destination or whether the service allows the subscriber to communicate with a person next door or the other side of the world.<sup>15</sup> What is required is that the “system,” however constructed, permit the subscriber to send and receive information of the subscriber’s choosing, to points of the user’s choosing, and that the service be “comparable” in the sense that it provides the “local” link between the subscriber and the communications network as a whole. It is this final limitation – that the service provide the local link – that sets meaningful boundaries on the definition in subparagraph (B) and identifies “telephone exchange service” as a distinct and predictable subset of “telecommunications service.”

**C. BECAUSE xDSL SERVICES ARE A “TELEPHONE EXCHANGE SERVICE”  
THE COMMISSION DOES NOT NEED TO DETERMINE AT THIS TIME IF AN  
xDSL SERVICE CAN ALSO BE USED FOR “EXCHANGE ACCESS.”**

MindSpring does not agree with U.S. West’s analysis regarding xDSL services and the definition of “exchange access.” However, because it is clear that xDSL services and other advanced telecommunications services are “telephone exchange services” when offered to residential and business subscribers as their local link to telecommunications networks or ISPs,

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the subscriber’s central office, a subscriber may get a “busy” signal and have to wait for access. This type of service helps illustrate the varying gradations that appear as new services are deployed. Under the U.S. West approach the Commission will be forever trying to determine exactly when a new service crosses the line from telephone exchange service to some other kind of local service. An approach based on this sort of technical (and perhaps semantic) hairsplitting is neither workable nor authorized under the Act. See [www.uswest.com/products/data/dsl/256select.html](http://www.uswest.com/products/data/dsl/256select.html) (as posted September 22, 1999).

<sup>15</sup> It should also be noted that in a packet switched network the location of switches may be different from the switch location, and the physical proximity of switches, used in a circuit switched voice network. Nothing in the definition in subparagraph (B) suggests that the location of the facilities should determine whether or not a service is a “telephone exchange service” and even the definition in subparagraph (A) recognizes that technology may evolve by including a “connected system of exchanges... in the same exchange area.” Many exchange areas are actually quite large.

there is no need to identify at this time when an xDSL service may be properly classified as “exchange access.”<sup>16</sup>

## CONCLUSION

The Commission should affirm its earlier conclusions in the *Advanced Services Order* by interpreting the term “comparable service” in subparagraph (B) of the definition of “telephone exchange service” to mean a service that, like the traditional telephone exchange network described in subparagraph (A) of the definition, provides the “local” access link between the end user (whether business or residential) and providers of telecommunications or information services. Further, the Commission should affirm that the new definition provided by Congress in subparagraph (B) is broader in scope than the earlier definition retained in subparagraph (A), and applies to all “telecommunications services” that provide an originating and terminating access link to intraexchange, interexchange, or information services, without regard to the presence or absence of switching, the geographic location or type of facilities used, where or to whom the subscriber’s information is sent, or the nature or characterization of the charge paid by the end-user for that service.

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<sup>16</sup> U.S. West advances the argument that its xDSL service is not “exchange access” because it is an “information access” service identified under section 251(g) of the Act. *U.S. West Brief at 36*. Section 251(g) was a transitional mechanism necessitated by Congress’ decision to transfer enforcement of the AT&T and GTE consent decrees to the Commission. *Conference Report to Accompany S. 652, House of Representatives Report 104-458 (Feb. 1, 1996), pp. 122-123*. As such section 251(g) used terms that reflect the language of those consent decrees, and those terms should be used only in that context. Congress did essentially adopt two definitions set forth in the AT&T Consent Decree – “information service” and “telecommunications service” – and specifically did not adopt the others, including “exchange access” and “information access.” In fact, Congress adopted a different definition of “exchange access” and did not include any definition of “information access” in the Act. *See 47 U.S.C. 153*. In light of these deliberate decisions by Congress, U.S. West’s suggestion that Congress intended section 251(g) to create new classes of service not covered under other provisions of the Act is simply not credible.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "E. Comstock", with a long horizontal flourish extending to the right.

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Counsel for MindSpring Enterprises, Inc.

Dated: September 24, 1999

### Certificate of Service

This is to certify that a copy of the foregoing was hand delivered this 24<sup>th</sup> day of September, 1999 to:

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